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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Joseph Daniel Montes,
10 Plaintiff,

11 v.

12 Lora Morales Fernandez, et al.,
13 Defendants.
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No. CV-17-03117-PHX-DGC

ORDER

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16 Pro se Plaintiff Joseph Montes filed a complaint against Defendants Lora
17 Fernandez, Brenda Spence, and Deena Steinmetz, alleging deprivations of his Fourth and
18 Fourteenth Amendment rights. Doc. 1. Fernandez has filed a motion to dismiss the
19 complaint under Rule 12(b)(6). Doc. 28. Plaintiff responded (Doc. 32), and Defendant
20 did not reply. No party requests oral argument. The Court will grant the motion.

21 **I. Background.**

22 For purposes of this motion, Plaintiff's factual allegations are accepted as true.
23 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). On April 29, 2017, Fernandez, a private
24 citizen, filed a false complaint with the Arizona Department of Child Safety ("DCS")
25 regarding Plaintiff's treatment of his three minor children. Doc. 1 at 2. As a result of this
26 complaint, DCS employee Spence authorized the removal of the three children from
27 Plaintiff's custody. *Id.* On May 2, 2017, DCS employee Steinmetz removed the children
28 from their schools and took them into DCS custody. *Id.* At a subsequent court hearing, a

1 commissioner granted DCS temporary custody of Plaintiff's children. *Id.*

2 Plaintiff seeks \$5 million in damages for alleged violations of his Fourth and
3 Fourteenth Amendment rights. *Id.* at 3.

4 **II. Legal Standard.**

5 A successful motion to dismiss under Rule 12(b)(6) must show either that the
6 complaint lacks a cognizable legal theory or fails to allege facts sufficient to support its
7 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A
8 complaint that sets forth a cognizable legal theory will survive a motion to dismiss as
9 long as it contains "sufficient factual matter, accepted as true, to 'state a claim to relief
10 that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v.*
11 *Twombly*, 550 U.S. 544, 570 (2007)). A claim has facial plausibility when "the plaintiff
12 pleads factual content that allows the court to draw the reasonable inference that the
13 defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing
14 *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability
15 requirement,' but it asks for more than a sheer possibility that a defendant has acted
16 unlawfully." *Id.* The Ninth Circuit has directed district courts to "'construe [pro se]
17 pleadings liberally and . . . afford [pro se parties] the benefit of any doubt.'" *Byrd v. Phx.*
18 *Police Dep't*, 885 F.3d 639, 642 (9th Cir. 2018) (quoting *Bretz v. Kelman*, 773
19 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc)).

20 **III. Discussion.**

21 The Court interprets Plaintiff's complaint as a 42 U.S.C. § 1983 action alleging
22 violations of his Fourth and Fourteenth Amendment rights. *See* Doc. 32 (arguing § 1983
23 standards). Fernandez contends that the complaint against her must be dismissed because
24 a § 1983 claim cannot be brought against a private citizen. Doc. 28 at 1-2.

25 "Section 1983 is a vehicle by which plaintiffs can bring federal constitutional and
26 statutory challenges to actions by state and local officials." *Naffe v. Frey*, 789
27 F.3d 1030, 1035 (9th Cir. 2015) (internal quotation marks omitted). To state a claim
28 under § 1983, a plaintiff must allege two elements: (1) the violation of a right secured by

1 the Constitution or laws of the United States, (2) by a person acting under the color of
2 state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). Dismissal of a § 1983 claim “is proper
3 if the complaint is devoid of factual allegations that give rise to a plausible inference of
4 either element.” *Naffe*, 789 F.3d at 1036.

5 A person acts under color of state law if she exercises “power possessed by virtue
6 of state law and made possible only because the wrongdoer is clothed with the authority
7 of state law.” *West*, 487 U.S. at 49 (internal quotation marks omitted). This requirement
8 generally limits § 1983 suits to claims against public officials. To establish that a private
9 individual like Fernandez acted under color of state law, a plaintiff must show that the
10 individual “conspired or acted jointly with state actors” to deprive the plaintiff of his
11 constitutional rights. *Radcliffe v. Rainbow Const. Co.*, 254 F.3d 772, 783 (9th Cir. 2001)
12 (citing *United Steelworkers v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540 (9th Cir. 1989)).
13 “A mere allegation of conspiracy without factual specificity is insufficient.” *Karim-*
14 *Panahi v. L.A. Police Dep’t*, 839 F.2d 621, 626 (9th Cir. 1988). Plaintiff must plead
15 evidence of “an agreement or meeting of the minds to violate constitutional rights.”
16 *Radcliffe*, 254 F.3d at 783 (quoting *Phelps Dodge*, 865 F.2d at 1540-41).

17 The complaint contains a single allegation about Fernandez: “On April 29, 2017,
18 Lora Morales Fernandez, made false allegations to the Department of Child Safety
19 hotline, which led to the involuntary removal of my three children . . . from their
20 schools.” Doc. 1 at 2. The complaint does not allege that Fernandez conspired or acted
21 jointly with state actors to deprive the plaintiff of his constitutional rights. *Radcliffe*, 254
22 F.3d at 783. The Court accordingly will dismiss the complaint against Fernandez.¹

23 Plaintiff’s response does not cure this deficiency. He offers a conclusory assertion
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25 ¹ Because the Court will dismiss the complaint on this ground, it need not consider
26 Fernandez’s other argument that she is absolutely privileged under Arizona law. Doc. 28
27 at 1. The Court notes, however, that “state law immunities have no force against § 1983
28 suits where the state law immunity purports to provide immunity ‘over and above those
already provided in § 1983.’” *Sosa v. Hiraoka*, 920 F.2d 1451, 1460 n.3 (9th Cir. 1990)
(quoting *Howlett v. Rose*, 496 U.S. 356, 376 (1990)). If Plaintiff amends his complaint,
Fernandez may rely on this argument so long as she establishes its applicability under
federal law.

1 that Fernandez conspired with DCS employees, but the Court must limit its review to the
2 well-pled allegations in the complaint. *Van Buskirk v. Cable News Network, Inc.*, 284
3 F.3d 977, 980 (9th Cir. 2002) (“Ordinarily, a court may look only at the face of the
4 complaint to decide a motion to dismiss.”).

5 **IV. Leave to Amend.**

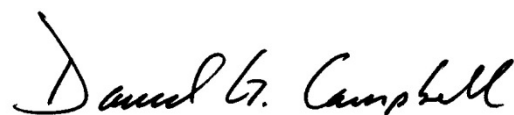
6 “A pro se litigant must be given leave to amend his or her complaint unless it is
7 absolutely clear that the deficiencies of the complaint could not be cured by amendment.”
8 *Karim-Panahi*, 839 F.2d at 623 (internal quotation marks omitted). In this case, it is not
9 absolutely clear that Plaintiff will be unable to cure the deficiencies in his complaint by
10 amendment.

11 Before dismissing a pro se civil rights complaint, the district court must also “give
12 the plaintiff a statement of the complaint’s deficiencies.” *Karim-Panahi*, 839 F.2d
13 at 623, 625 (“We do not . . . require the district court to act as legal advisor to the
14 plaintiff. However, the court must do more than simply advise the pro se plaintiff that his
15 complaint needs to [comply with Rule 8]. The district court is required to draft a few
16 sentences explaining the deficiencies.” (internal quotation marks and citations omitted)).
17 Having set forth above the § 1983 standard for private individual liability and reasons for
18 dismissal, the Court will dismiss the complaint without prejudice. The Court will grant
19 Plaintiff leave to file an amended complaint by no later than April 29, 2018.

20 **IT IS ORDERED:**

- 21 1. Defendant Lora Fernandez’s motion to dismiss (Doc. 28) is **granted**.
- 22 2. Plaintiff’s complaint (Doc. 1) against Defendant Fernandez is **dismissed**
23 **without prejudice**.
- 24 3. Plaintiff shall have until **April 29, 2018**, to file an amended complaint.

25 Dated this 9th day of April, 2018.

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David G. Campbell
United States District Judge